

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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Love A. Brooks,

Petitioner,

CV 06-1728 (CPS)

- against -

MEMORANDUM  
OPINION AND ORDER

United States of America,

Respondent.

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SIFTON, Senior Judge.

On December 19, 1996, petitioner *pro se* Love Brooks was sentenced to two concurrent life sentences plus an additional fifty years in prison. Petitioner was convicted, after a fourteen week jury trial, on seven counts of a multi-count indictment charging him with arson in violation of 18 U.S.C. § 884(I)(count 30), using and carrying a destructive device in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (count 31), conspiracy to murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(5)(counts 32 and 33), murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1)(count 34), using and carrying a firearm in relation to crimes of violence in violation of 18 U.S.C. § 924(c)(1)(count 35), and conspiracy to distribute and possess with intent to distribute cocaine base and heroin in violation of 21 U.S.C. § 846 (count 44). Now before this Court is an application filed by petitioner entitled "motion to vacate or set aside sentence or arrest judgment." For the reasons set forth below, petitioner's

application is dismissed without prejudice.

### **Background**

Following petitioner's conviction and direct appeal of his conviction, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255, which was considered and denied by this Court on December 31, 2002. This Court's judgment was affirmed by the Court of Appeals in a summary order dated October 29, 2003. Petitioner then filed another application, pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, seeking (1) to correct a clerical mistake relating to the certificate of appealability ("COA") issued with respect to his earlier habeas petition; and (2) for reconsideration of this Court's December 2002 denial of his § 2255 petition. That petition was denied by this Court on August 26, 2005.<sup>1</sup>

In petitioner's present application, he does not specify a statute or rule pursuant to which he seeks relief. In his submissions petitioner makes several challenges to his conviction, including: (Claim I) that the device used by petitioner was not a "destructive device" as defined by 18 U.S.C. § 921; (Claim II) that the government failed to prove at trial that petitioner conspired to murder or that he aided and abetted

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<sup>1</sup> Petitioner has appealed that decision and the Court of Appeals has not yet ruled on the appeal.

a murder; (Claim III) that the government failed to prove at trial that he received money from a racketeering enterprise as required by 18 U.S.C. § 1959; (Claim IV) that the government failed to prove at trial that petitioner conspired to possess and distribute narcotics; (Claim V) that the indictment was "defective" since it was unsigned; (Claim VI) that the trial judge violated petitioner's right to confront witnesses and right to a trial by jury when he denied petitioner the opportunity to confront the author of his pre-sentence report; (Claim VII) that the government improperly prosecuted plaintiff on charges of aiding in racketeering without also charging him with the substantive charge of racketeering; and (Claim VIII) that the Second Circuit's 2003 affirmance of this Court's 2002 decision was in error and that the Clerk's Office of this Court mistakenly returned petitioner's January 2003 application for a COA to him, rather than transferring it to the Second Circuit, denying petitioner access to the courts.

### **Discussion**

#### *I. Claims Relating to the Integrity of Conviction and Sentence*

As I have previously stated in response to previous petitions filed by petitioner, motions relating to the integrity of the conviction or sentence in federal court are ordinarily brought pursuant to 28 U.S.C. § 2255. *Brooks v. U.S.*, 2005 WL

2076565, at \*5 (E.D.N.Y. 2005). As explained in *Melton v. U.S.*, 359 F.3d 855, 857 (7<sup>th</sup> Cir. 2004), "no matter what title the prisoner plasters on the [application's] cover...[i]t is the substance that controls" and a petitioner cannot avoid the requirements of § 2255 by "inventive captioning." Here, the substance of petitioner's applications regarding Claims I through VII clearly question the integrity of his conviction and, as such, are within the scope of § 2255. However, as the government notes, the Second Circuit has restricted the power of district courts "to *sua sponte* convert post-conviction motions . . . without first giving the petitioner notice and an opportunity to decline the conversion or withdraw the motion." *Simon v. U.S.*, 359 F.3d 139, 140 (2d Cir. 2004); see also *Adams v. United States*, 155 F.3d 582 (2d Cir.1998); *Gitten v. United States*, 311 F.3d 529 (2d Cir. 2002). In light of these decisions, the Court declines to *sua sponte* characterize petitioner's motion as one brought pursuant to § 2255 and petitioner's Claims I through VII are dismissed without prejudice to their renewal. If petitioner wishes the Court to consider the substance of these applications, he is directed to notify the Court in writing of the specific rule or statute pursuant to which each of these applications is made within sixty (60) days of the date of this decision. Should petitioner decide to pursue relief pursuant to 28 U.S.C. § 2255, he should be aware that unless certain narrow exceptions apply, a

prisoner serving a federal sentence may bring only one § 2255 petition; successive § 2255 petitions must be authorized by the appropriate court of appeals. As discussed, petitioner has already commenced a § 2255 petition, which this Court denied. To the extent that his present application is considered a second or successive § 2255 petition, it will be transferred to the Second Circuit Court of Appeals, which may decide not to permit him to pursue a successive petition.

## *II. Claim VIII*

The two arguments referred to by petitioner in Claim VIII which do not relate to integrity of petitioner's conviction are not properly before this Court. Petitioner's claim that the Second Circuit erred in affirming the appeal from this Court may only be considered by the Supreme Court of the United States. As for petitioner's claim that the Clerk of the Court denied petitioner his right of access to the courts, this Court has already stated that while "the evidence suggests that the Clerk's Office of this Court mistakenly returned Brooks' application for a COA to him, rather than transferring it to the Second Circuit . . . this Court does not have jurisdiction to recall the mandate issued by the Second Circuit on October 29, 2003. For such relief, Brooks must make an application to the Second Circuit Court of Appeals." *Brooks*, 2005 WL 2076565, at \*4.. Accordingly,

petitioner's applications for relief on Claim VIII are dismissed without prejudice to their renewal before the proper courts.

**Conclusion**

For the reasons set forth above, petitioner's application is denied without prejudice. The Clerk is directed to transmit a copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York  
June 4, 2007

By: /s/ Charles P. Sifton (electronically signed)  
United States District Judge